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No. 87-1085

In The

Supreme Court of the United States

October Term, 1987

FAITH CHRISTIAN FELLOWSHIP INTERNATIONAL, INC., FAITH CHRISTIAN FELLOWSHIP OF MILWAUKEE, INC., a/k/a WORD ALIVE CHRISTIAN FELLOWSHIP, a Wisconsin corporation,

Petitioner,

v.

BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE, a Wisconsin quasi-judicial municipal body, and CITY OF MILWAUKEE, a Wisconsin municipality,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GRANT F. LANGLEY
City Attorney
800 City Hall
200 East Wells Street
Milwaukee, WI 53202-3551
(414) 278-2601
Attorney for Respondents

THOMAS O. GARTNER
LINDA ULISS BURKE
Assistant City Attorneys

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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STATEMENT OF THE CASE

Respondents accept Petitioner's Statement of the Case. Respondents further accept the Appendix of Petitioner and will make reference thereto in the same manner employed by Petitioner.

ARGUMENT

The respondent Board of Zoning Appeals of the City of Milwaukee ("The Board") denied Petitioner a special exception to locate its church in the first floor of a building in an area zoned for local business. This action was taken after a hearing at which appearances were made by 11 individuals. (A-20-22) The trial court ruled that the Board's findings were not arbitrary or capricious and were reasonably based upon the evidence and testimony presented. (A-8-17) The Wisconsin Court of Appeals also ruled that the evidence was such that the Board's determination was reasonable. (A-3-7)

In its petition, Petitioner does not argue that municipalities cannot regulate the location of churches in business districts. Petitioner instead asserts that all state courts, when reviewing decisions which deny a church a special exception granting permission to so locate, should "strictly scrutinize" the record. Because the Board's decision was alleged to impose a substantial burden on the free exercise of religion, Petitioner argues that the reviewing courts utilized an improper standard of review. The decision of the state court of last resort was thus asserted by the Petitioner to be in conflict with decisions of this court, federal courts of appeal and other state courts.

I. NO IMPORTANT FEDERAL QUESTION HAS BEEN RAISED WHICH SHOULD BE SETTLED BY THIS COURT.

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) establishes the standard for determining when a zoning regulation infringes upon a church's First Amend-

ment rights. In that decision the Sixth Circuit held that a restriction on the ability of a church to locate in a particular zoning district in a city does not infringe upon the freedom of worship, but regulates a purely secular act. The restriction does not prohibit worship in the city, it only limits where in the city the church might be located. Such a restriction was held to constitute an incidental economic burden rather than an unconstitutional infringement upon First Amendment rights.

Where there is no First Amendment infringement courts must determine whether there has been a denial of the liberty to use property without due process in violation of the Fourteenth Amendment. *Lakewood, supra,* at p. 305. The Wisconsin courts have established the appropriate standard for a review of decisions rendered by zoning boards of appeal in *Snyder v. Waukesha County Zoning Board,* 74 Wis. 2d 468, 247 N.W.2d 98 (1976); that standard was applied by the reviewing court in this case and afforded Petitioner the due process mandated by the United States Constitution.

Petitioner attempts to exempt its situation from the general rule of *Lakewood, supra,* stating that it is attempting to establish a Spanish-speaking church, needed by the neighborhood in question. Petitioner asserts that this fact renders any regulation of its location to be a substantial burden on the free exercise of religion, requiring "strict scrutiny" of the decision. Again, Respondents note that the Board's action merely denied permission to locate a church in a particular building in a local business zoning district. It has never been alleged that the Board's decision was based upon the language spoken by

members of the congregation. Similarly, petitioner has never alleged a pattern on the part of the Board of denying permission to certain types of churches to locate in particular areas, or a pattern of discrimination against Spanish-speaking congregations.

Respondents can find no case, and Petitioner has failed to cite any authority, holding that it is unconstitutional to regulate the location of churches in business districts or to exclude churches from business districts completely. In fact, courts have specifically approved of the special use exception procedure in this context, subject to the same limited judicial review applicable to zoning cases involving uses other than churches. *Hope Deliverance Center v. Zoning Board of Appeals*, 116 Ill. App. 3d 868, 452 N.E.2d 630 (Ct.App. 1983); *South Side Move of God Church v. Zoning Board of Appeals of the City of Chicago*, 47 Ill. App. 3d 723, 365 N.E.2d 118 (Ct.App. 1977); *Coston Chapel A.M.E. Church v. Chaddick*, 9 Ill. App 3d 321, 292 N.E.2d 215 (Ct.App. 1972).

Inasmuch as petitioner has not shown that its First Amendment rights have been infringed upon or substantially burdened by the decision to deny it a special exception to locate in a local business district, its argument concerning the appropriate standard of review on appeal presents no important question of federal law.

II. THE DECISION OF THE STATE COURT DOES NOT CONFLICT WITH THE DECISIONS OF OTHER STATE OR FEDERAL COURTS.

There is no split of authority regarding the issue raised in the instant petition. The decisions of the Wisconsin courts in this case are perfectly consonant with

Lakewood, supra, in that they considered the constitutional issue presented and determined that no infringement of a constitutional right occurred. The threshold test was not met; consequently the reviewing courts proceeded to apply the appropriate due process standard of review to the zoning board's decision.

The state court decisions cited by Petitioner pertaining to the location of a church do not present a split of authority. In *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Zoning Appeals of the City of Chicago, et al.,* 25 Ill. 2d 65, 182 N.E.2d 722 (Ill. 1962), which was decided 21 years before the *Lakewood* case, the Illinois Supreme Court held that the location of a church could have some impact on the practice of religion. However, the court then proceeded to review the testimony in the record before the zoning board, and found that the zoning board's decision was arbitrary and capricious inasmuch as the church had actually met the standards set forth in the pertinent ordinance. The court specifically based its holding on the evidence in the record and the standards set forth in the zoning ordinance and proceeded to apply a due process analysis. In other words, the court inquired into whether due process was afforded at the administrative level, the appropriate standard of review applicable to such zoning decisions, and did not use a "strict scrutiny" approach.

Farhi v. Deal Borough Commissioners, 204 N.J. Super. 575, 499 A.2d 559 (1985), was decided in exclusive reliance upon the New Jersey State Constitution and involved the gathering of religious worshipers in the plaintiff's home, which was located in a residential zoning dis-

trict. The zoning regulations in that case were determined to be unduly burdensome and a strict scrutiny analysis was applied based upon the New Jersey Constitution.

Clearly, adoption or application of any ordinance which infringes upon the First Amendment right to freedom of religion can only be justified by a compelling governmental interest. *Wisconsin v. Yoder*, 406 U.S. 205 (1971) and *Sherbert v. Werner*, 374 U.S. 398 (1963). However, such an infringement is not presumptive but rather must be demonstrated in each instance. The facts of this case do not demonstrate the existence of such an infringement.

The Petitioner argues that the decision in the case at bar is contrary to the rulings of this court in *Yoder, supra*, and that it also runs counter to the *Lakewood* decision and the holding of *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986). Those cases all found that an infringement upon a constitutional right would require strict scrutiny of the challenged legislation or action. No Wisconsin court has disagreed with that proposition. However, as stated above, no court has found that the existence of a special exception process governing the location of a church in a business district rises to the level of such an infringement.

Because there is no conflict among the courts as to the issue raised by Petitioner, the writ should be denied.

CONCLUSION

For the forgoing reasons, the petition for Writ of Certiorari to review the judgment and opinion of the Wisconsin Supreme Court should be denied.

Respectfully submitted,

GRANT F. LANGLEY
Milwaukee City Attorney
800 City Hall
200 East Wells Street
Milwaukee, WI 53202-3551
(414) 278-2601

Attorney of Record for Respondents

THOMAS O. GARTNER
LINDA ULISS BURKE
Assistant City Attorneys

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